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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: [redacted] Office: Miami Date: SEP 30 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

IN BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Miami, Florida, who certified his decision to the Administrative Appeals Office (AAO) for review. The case will be remanded to the acting district director for further action.

The applicant is a native and citizen of Colombia who filed this application for adjustment of status to that of a lawful permanent resident under section 1 of the Cuban Adjustment Act of November 2, 1966 (CAA). This Act provides, in part:

> [T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

The acting district director determined that the applicant did not qualify for adjustment of status as the spouse of a lawful permanent resident who adjusted under section 1 of the CAA. The acting district director, therefore, denied the application.

In response to the notice of certification, counsel states that the applicant's spouse [redacted] filed two separate and successive applications for adjustment of status. The first one was on March 23, 2000 under the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the second one on May 7, 2002 under the CAA, jointly with his wife (the applicant). On May 30, 2002, the Service advised Mr. [redacted] that his NACARA application had been approved. On November 26, 2002, at a Service interview, the applicant's attorney explained to the Service officer that Mr. [redacted] wished to withdraw his NACARA application to make way for his adjustment under CAA, because "adjustment under NACARA would make him a resident, but would leave his non-Nicaraguan/non-Cuban wife out in the cold." Counsel asserts that the Service officer stated that Mr. [redacted] was already a LPR under NACARA, and

therefore could not withdraw from that status to now seek adjustment under the CAA. Counsel further asserts that there is "nothing sinister in Mr. [redacted] refusal to be adjusted under NACARA: he simply wouldn't get along a procedure that would leave out his wife, when there was another procedure in place to which he was and is fully entitled."

The record reflects that on May 28, 2002, the applicant's spouse's (Mr. [redacted] NACARA application was approved. On March 26, 2002 at Miami, Florida, the applicant married Mr. [redacted] a native and citizen of Cuba. Based on that marriage, on May 8, 2002, the applicant filed for adjustment of status under section 1 of the CAA.

Counsel asserts that on November 26, 2002 the applicant's prior attorney explained to the Service officer that the applicant wished to withdraw his NACARA application to make way for his adjustment under CAA. The Service was correct in stating that an application cannot be withdrawn once a final decision is made. *See Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976). However, there is no evidence in the record of proceeding that the applicant's status was, in fact, adjusted to that of a lawful permanent resident. A completed Form I-181 is not contained in the record, nor does the Service record indicate that an I-551 card has been issued to the applicant. Therefore, in this case, there is no evidence that a final decision has been made on Mr. Andres' application for permanent residence under NACARA.

In support of his decision, the acting district director quoted an unpublished AAO decision that indicated that an applicant must be the spouse of an alien who had been admitted into the United States under section 1 of the CAA. In its decision, the AAO cited *Matter of Milian*, 13 I&N Dec. 480 (Acting Reg. Comm. 1970). The AAO has determined that the interpretation of *Matter of Milian* as found in the quoted decision was incorrect. An applicant need only show that his or her Cuban spouse meets all the criteria of the CAA, not that the Cuban spouse was admitted to the United States under section 1 of the CAA.

Pursuant to section 1 of the CAA, the spouse and child of "any alien described in this subsection" may adjust status to that of an alien lawfully admitted for permanent residence, regardless of their citizenship and place of birth, if they are residing with such alien in the United States. The record, however, does not establish whether Mr. [redacted] was inspected and admitted or paroled

into the United States prior to the claimed adjustment of status, or whether he would have been otherwise eligible for adjustment under section 1 of the CAA. *See Matter of Milian*, 13 I&N Dec. 480, 482 (Acting Reg. Comm. 1970).

As concluded in *Matter of Benguria Y Rodriguez*, "[s]ection 1 obviously refers to those Cuban refugees who were inspected and admitted as *nonimmigrants or paroled into the United States.* If this were not correct, then the provision in this section permitting adjustment of status to that of an alien lawfully admitted for permanent residence would be without purpose." 12 I&N Dec. 143, 144 (Reg. Comm. 1967)(emphasis in original). *Matter of Benguria Y Rodriguez* also notes that section 2 of the Cuban Adjustment Act speaks of "any alien described in section 1" and refers to "the date the alien originally arrived in the United States as a nonimmigrant or as a parolee." *Id.*

Accordingly, as the record does not establish whether the spouse of the applicant (Mr. [redacted]) was inspected and admitted as a nonimmigrant, or paroled, or whether he in fact adjusted status under NACARA, the case will be remanded to the acting district director for further review and entry of a new decision which, if adverse to the applicant, is to be certified to the AAO for review.

ORDER: The acting district director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.